Mountaineer Park, Inc. *and* United Food and Commercial Workers International Union, Local Union 23, AFL-CIO, CLC. Case 6-RC-12289

December 16, 2004

DECISION AND DIRECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections and determinative challenges in an election held December 19, 2003, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 75 for and 70 against the Petitioner, with seven challenged ballots, a number sufficient to affect the election results.

The Board has reviewed the record in light of the exceptions[1] and briefs and has adopted the hearing officer's findings[2] and recommendations[3] only to the extent consistent with this Decision and Direction.

Introduction

The only remaining issue in this case is the Employer's challenges to the ballots of employees Evelyn Fullerton and Cheryl Guzzo—both of whom are "assistant supervisors" in the Employer's housekeeping department—on the grounds that these individuals are statutory supervisors. Contrary to the hearing officer, we find that Fullerton and Guzzo are supervisors within the meaning of Section 2(11) of the Act, and that they are therefore excluded from the bargaining unit. Accordingly, we sustain the challenges to their ballots.

Facts

The Employer operates a racetrack and gaming resort in Chester, West Virginia. The Petitioner seeks to represent a unit that includes, inter alia, the Employer's housekeeping employees at that facility.

The Employer's housekeeping department is divided into a "lodge" section and a "gaming" section. Approximately 25 to 35 housekeepers are employed in the lodge section on a daily basis and about 20 are employed in the gaming section. Director of Housekeeping David Rellis oversees the operations of both sections. Each section has its own supervisor: Debbie Kuykendal supervises the lodge section and Billy Jo Jenkins supervises the gaming section.[4] Both Kuykendal and Jenkins work five days per week. Rellis testified that when Kuykendal and Jenkins are not on duty (i.e., two days per week each), their supervisory duties are performed by "assistant supervisors" Fullerton and Guzzo, respectively.[5] He also testified that Fullerton and Guzzo perform such duties even when Kuykendal and Jenkins are on duty. In this regard, Rellis testified that Fullerton and Guzzo typically spend fifty percent of their workdays performing housekeeping work and the remainder performing supervisory duties. Apparently, this percentage varies according to whether Kuykendal and/or Jenkins are on duty; when they are on duty, Fullerton and Guzzo spend a greater percentage of their time performing housekeeping work and less time performing supervisory duties, and vice-versa.[6]

Rellis credibly testified that, while Fullerton and Guzzo are performing supervisory duties, they have the authority, inter alia, to effectively recommend employee discipline. In this respect, he testified that they have the authority to decide on their own volition whether to initiate discipline. They are authorized to write up recommendations for disciplinary action, in which they suggest a level of discipline that they deem appropriate according to the seriousness of the infraction. Rellis testified that, at that point, "[t]hey [the disciplinary write-ups] get

[1] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Petitioner's Objections 1 and 3, which allege, respectively, that the Employer improperly altered its method of paycheck distribution prior to the election and that it provided the Petitioner with an *Excelsior* list containing incorrect addresses for certain bargaining unit employees. See *Excelsior Underwear*, 156 NLRB 1236 (1966). Further, in the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the challenges to the ballots of employees Wanda Board, Dwayne Edward Franklin, Crystal D. Gajtka, Julie Lynne Krynicki, and Laura Lynn Smith on the grounds that these individuals are not statutory supervisors.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359 (1957). We have carefully examined the record and find no basis for reversing the findings.

[3] For the reasons stated in the hearing officer's report, we adopt the hearing officer's recommendation to overrule Petitioner's Objection 2, which alleges that the Employer stationed a supervisor of guards outside of the entrance to the polling place, "thus creating a chilling and intimidating effect on the free choice of voters."

[4] The parties stipulated that these individuals are statutory supervisors.

[5] Fullerton and Guzzo did not testify at the hearing.

[6] It is also important to note that assistant supervisors such as Fullerton and Guzzo, like the stipulated statutory supervisors, wear uniforms and are paid on an hourly basis. Assistant supervisors are paid about $1.25 less than the stipulated supervisors, yet they are paid $0.50 to $1.00 more than senior housekeepers.

turned into me to review. It is routine, if it is justifiable, I will sign off on it. Then it can be presented."

> [Q. Do you regard these recommendations as being effective?]
> Yes

Our dissenting colleague reads Rellis' testimony as indicating that he will sign off on the recommended discipline only when it is routine or justifiable. We read it differently. Rellis is stating that, if the discipline is justifiable, he routinely approves it. We view Rellis' stated standard of review ("justifiable") as according significant autonomy and discretion to the assistant supervisors. Rellis testified that he has received between three to five recommendations for disciplinary action from Fullerton over the course of the past year, and he has approved all of these recommendations. He has not received any such recommendations from Guzzo.[7]

Based on Rellis' testimony, the Employer contends that Fullerton and Guzzo are statutory supervisors and should therefore be excluded from the unit. The hearing officer found that Fullerton and Guzzo are not supervisors and recommended overruling the challenges to their ballots. The Employer excepts to this finding, arguing, in part, that Fullerton and Guzzo exercise independent judgment in effectively recommending employee discipline. For the reasons set forth below, we reverse the hearing officer and sustain the challenges to the ballots of Fullerton and Guzzo.

Analysis

Section 2(11) of the Act, 29 U.S.C. § 152(11), defines the term "supervisor" as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or to responsibly direct them, or to adjust their grievances, or to effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

An individual need only possess *one* of these indicia of supervisory authority as long as the exercise of such authority is carried out in the interest of the employer, and requires the use of independent judgment. *Arlington Masonry Supply, Inc.*, 339 NLRB No. 99, slip op. at 2 (2003). Significantly, it is not required that the individual have exercised any of the powers enumerated in the statute; rather, it is the *existence* of the power that determines whether the individual is a supervisor. Id. Further, the burden of proving that an individual is a statutory supervisor rests on the party alleging such status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001).

Applying these principles to the facts of this case, we find that the Employer has met its burden of proving that Evelyn Fullerton and Cheryl Guzzo possess supervisory authority within the meaning of Section 2(11). Specifically, we find, contrary to the hearing officer, that Fullerton and Guzzo exercise independent judgment in effectively recommending employee discipline to Director of Housekeeping Rellis.[8]

A. Authority to Effectively Recommend Discipline

In rejecting the Employer's contention that Fullerton and Guzzo effectively recommend discipline, the hearing officer noted that, although Fullerton and Guzzo have the authority to submit written disciplinary recommendations to Rellis, Rellis makes an "independent determination" as to whether discipline should be issued. Thus, the hearing officer concluded that Fullerton's and Guzzo's role in disciplining employees is limited to merely reporting potential disciplinary problems to Rellis and does not involve the exercise of independent judgment.

We disagree. Rellis' credited testimony demonstrates that, even if Fullerton and Guzzo do not issue discipline to employees entirely on their own, they use independent judgment in effectively recommending discipline to Rellis. In this regard, they have the authority to bring employee rule infractions and misconduct to Rellis' atten-

[7] The recommendations prepared by Fullerton are not in the record.

[8] However, for the reasons set forth in the hearing officer's report, we agree with the hearing officer that there is no merit in the Employer's argument that Fullerton and Guzzo are supervisors by virtue of their stated authority to assign work and/or direct the work of employees.

Chairman Battista would find that Fullerton and Guzzo are supervisors on the additional basis of their regular service as substitute supervisors. It is undisputed that, on two full days per week, Fullerton and Guzzo perform all the duties of their respective supervisors, Kuykendal and Jenkins. Such a performance of supervisory duties is both regular and substantial. See *Aladdin Hotel*, 270 NLRB 838, 840 (1984) (casino dealers who have substituted for supervisors on the average of at least two times per month over the past three months are supervisors); *Honda of San Diego*, 254 NLRB 1248, 1249-50 (1981) (employee who served as supervisor 10 of 40 hours per week is excluded from unit as supervisor).

Member Schaumber concurs that regular and substantial performance of supervisory duties as a substitute supervisor may establish supervisory status within the meaning of Sec. 2(11). In his view, the titular designation of "substitute supervisor" is not controlling; rather, one must look to the duties actually performed while functioning in that capacity. In the instant case, the record reflects that assistant supervisors possessed the authority to effectively recommend discipline, as evidenced by the uncontradicted testimony that they did so and that such disciplinary recommendations were routinely followed by Director of Housekeeping Rellis.

tion, thereby initiating the disciplinary process; and, in the process of doing so, they can write up recommendations for Rellis concerning what level of discipline they consider to be appropriate relative to the infraction or misconduct at issue. Further, and most significantly, when they decide to bring disciplinary issues to Rellis' attention, it appears that Rellis does not conduct an independent investigation of the incident in question. Contrary to the hearing officer's finding that Rellis makes an "independent determination" as to whether discipline should be issued, Rellis' credited testimony establishes that he has a policy of routinely "signing off" on the disciplinary recommendations made by Fullerton or Guzzo if he believes that the recommendations are justifiable. This is evidenced by the fact that Rellis has received three to five such recommendations from Fullerton and, without conducting *any* sort of investigation, he has followed her recommendations in *all* cases.[9] See *Donaldson Brothers Ready Mix*, 341 NLRB No. 124, slip op. at 5 (2004) (finding supervisory status where Respondent failed to show that individual's hiring and firing recommendations were overruled on any occasion); *Venture Industries*, 327 NLRB 918, 919 (1999) (finding supervisory authority to discipline where employer followed such recommendations 75% of the time).

In a recent case, *Progressive Transportation Services, Inc.*, 340 NLRB No. 126 (2003), the Board found that an individual who played a similar role to the roles Fullerton and Guzzo play in the disciplinary process was a statutory supervisor. In that case, the individual at issue, Sandra Yozzo, was a "deck lead supervisor." Id. at slip op. at 1. As part of her duties in that position, Yozzo was responsible for preparing and issuing disciplinary notices to the employer's dispatchers. Id. Yozzo first brought potential disciplinary issues to the attention of the operations manager who, without conducting an independent investigation, would decide on an appropriate level of discipline and determine how the disciplinary notice should be written up; in doing so, the operations manager would typically follow Yozzo's recommendations.[1] Id. at slip op. at 2-3. Based on the operations manager's determinations, Yozzo drafted the disciplinary notices, signed them as "supervisor," and issued them to the offending employees. Id. at slip op. at 3.

Given these facts, the Board found that Yozzo exercised independent judgment in effectively recommending discipline, and was therefore a statutory supervisor. In so finding, the Board emphasized the fact that Yozzo had the authority to decide on her own whether to initiate the disciplinary process by taking disciplinary issues to the operations manager; that the manager did not conduct an independent investigation of these issues, and he typically followed her recommendations regarding the imposition of discipline; and that Yozzo prepared, signed, and presented disciplinary notices to employees. Id. at slip op. at 2-4.

In the instant case, the facts surrounding Fullerton's and Guzzo's role in the disciplinary process constitute an even stronger basis for finding supervisory status than in *Progressive*. Fullerton and Guzzo have the authority not only to decide whether to trigger the disciplinary process--as did employee Yozzo--but they also have the authority to write up proposed disciplinary recommendations, in which they recommend a specific level of discipline before passing these recommendations on to Rellis. In contrast, in *Progressive*, supra, it was the operations manager, not Yozzo, who decided on the appropriate level of discipline for the infraction or misconduct at issue; Yozzo wrote up the disciplinary notice only *after* the manager had made this determination. In any event, Rellis, like the manager in *Progressive*, supra, has a policy of approving the disciplinary recommendations made by Fullerton and Guzzo without conducting a further investigation; and, as evidenced by his disposition of the recommendations he has received from Fullerton, he has followed such recommendations 100% of the time.

Based on this evidence, it appears that, if Fullerton or Guzzo decide on their own volition to bring a potential disciplinary issue to Rellis' attention, discipline ensues; and, the level of discipline that Rellis imposes in these situations is that which is recommended by Fullerton or Guzzo. Accordingly, although Fullerton and Guzzo do not have the authority to unilaterally impose employee discipline, the evidence in the record reflects that they do have the authority to *effectively recommend* discipline, and that they exercise independent judgment in doing so.

In finding that Fullerton and Guzzo effectively recommend discipline, we disagree with our dissenting colleague that there is "insufficient evidence" in the record to support this finding. Specifically, our dissenting colleague contends that there is insufficient evidence to show that the disciplinary recommendations made by Fullerton and Guzzo are approved by Rellis without his conducting an independent investigation. In so contend-

[9] Although Rellis has apparently not received any disciplinary recommendations from Guzzo, Rellis testified that she, like Fullerton, nonetheless has the authority to issue such recommendations. Thus, as discussed above, the fact that she has not exercised this authority does not preclude a finding that she possesses supervisory authority. See *Arlington Masonry*, supra, at slip op. at 2 (holding that it is the existence of supervisory authority, not the exercise of that authority, that determines whether or not an individual is a supervisor.).

[1] The record included 33 disciplinary notices, which demonstrated that the operations manager had followed Yozzo's recommendations to impose discipline.

ing, our dissenting colleague points to Rellis' testimony that these recommendations are sent to him "to review." Our dissenting colleague also notes that Rellis' testimony is silent as to how he "reviews" the recommendations—i.e., what actions he takes between the time he receives these recommendations and the time he reaches a final decision concerning their disposition. Based on this asserted "lack of evidence," our dissenting colleague reasons that Rellis' testimony does not establish either explicitly or implicitly that Rellis does not conduct an independent investigation concerning these recommendations. Rather, he reasons that Rellis' testimony establishes only that Rellis conducts *some* sort of "review" of the recommendations. We disagree.

Our dissenting colleague has misstated our position. He says that our position is that Rellis "rubber stamps" the disciplinary recommendations from Fullerton and Guzzo. That is not our view, i.e., we do not assert that any "rubber stamping" occurs. However, it does not follow that Rellis conducts an independent investigation. Rather, as the record shows, he "reviews" the recommendation, i.e., he considers it, and adds his own judgment and insight. Based on both, he reaches a decision. As noted above, Rellis credibly testified that, when he receives these recommendations, and they are "justifiable," he will "routine[ly]" sign off on them. The issue of supervisory status turns on the extent to which his decision relies on the recommendation. The record shows that such reliance is indeed weighty. The record evidence is that he follows the recommendation in all of the cases that reach him. Based on this evidence, we conclude that the recommendations are effective recommendations.

Our dissenting colleague also contends that there is no showing that the recommended discipline affected an employee's job status or formed the basis for further discipline. It is true that, in the instances where discipline was imposed, there is no record evidence as to what that discipline was. However, as discussed above, we are not confined to instances of actual discipline. The *authority* to recommend discipline can bestow supervisory status. In this regard, Rellis testified that Fullerton and Guzzo have the authority to recommend any level of discipline they wish.

Finally, our dissenting colleague would find that Fullerton's and Guzzo's authority in this regard is merely reportorial and does not require the exercise of independent judgment because they can only bring disciplinary issues to Rellis and they cannot issue discipline unilaterally. However, as noted above, Section 2(11) requires only that an individual have the authority to "effectively recommend" discipline—not that he or she have the final authority to impose it.

B. Secondary Indicia of Supervisory Status

In addition to their authority to effectively recommend discipline, Fullerton and Guzzo possess several secondary indicia of supervisory authority. In this regard, Fullerton and Guzzo receive an hourly wage that is $ 0.50 to $1.00 higher than that of senior housekeepers. They also wear the same uniforms as stipulated statutory supervisors Kuykendal and Jenkins.

CONCLUSION

In sum, for all of the foregoing reasons, we find that Fullerton and Guzzo are statutory supervisors within the meaning of Section 2(11). Accordingly, we sustain the challenges to their ballots.

DIRECTION

IT IS DIRECTED that the Regional Director shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Wanda Board, Dwayne Edward Franklin, Crystal D. Gajtka, Julie Lynne Krynicki, and Laura Lynn Smith, shall prepare and serve on the parties a revised tally of ballots, and shall issue the appropriate certification.

Dated, Washington, D.C. December 16, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

I join the majority in adopting the hearing officer's recommendation to overrule the Employer's objections in their entirety and in adopting the hearing officer's recommendation to overrule the challenges to the ballots of employees Wanda Board, Dwayne Edward Franklin, Crystal D. Gatjtka, Julie Lynne Krynicki, and Laura Lynne Smith on the grounds that these individuals are not statutory supervisors.

However, I disagree with the majority's finding that the Employer has met its burden of proving that Evelyn Fullerton and Cheryl Guzzo exercise independent judgment in effectively recommending employee discipline. Thus, contrary to the majority, I would adopt the hearing officer's finding that they are not statutory supervisors

and his recommendation to overrule the challenges to their ballots.[1]

Stated briefly, the relevant facts are as follows. The Employer operates a racetrack and gaming resort. The housekeeping department at the Employer is divided into a "lodge" section and a "gaming" section, both of which are overseen by Director of Housekeeping David Rellis. Rellis testified that Fullerton and Guzzo are "assistant supervisors" in the lodge and gaming sections, respectively; and, as such, they perform the duties of the stipulated statutory supervisors when those supervisors are not on duty.[2] Rellis testified that, in the course of performing these duties, Fullerton and Guzzo prepare disciplinary recommendations, in which they recommend a specific level of discipline relative to the degree of misconduct or rule infraction at issue, and that these recommendations "get turned in to [him] *to review*." Rellis also testified that, *if* the recommendations are "routine" or "justifiable," he will "sign off" on them. He further testified that he has received between three to five such recommendations from Fullerton, and he has approved all of them. However, he has never received any disciplinary recommendations from Guzzo.

On this evidence, the hearing officer found that, even though Fullerton and Guzzo have the authority to submit disciplinary recommendations to Rellis, Rellis makes an independent determination as to whether discipline should be issued. Thus, the hearing officer concluded that Fullerton's and Guzzo's role in disciplining employees is limited to merely reporting potential disciplinary issues to Rellis and therefore does not involve the exercise of independent judgment.

In reversing the hearing officer's finding that Fullerton and Guzzo are not statutory supervisors, the majority concedes that Fullerton and Guzzo do not issue discipline directly. They also concede that Fullerton and Guzzo report rule infractions and other instances of misconduct to Rellis, and that it is Rellis—not Fullerton and Guzzo—who then decides whether to impose discipline. Nonetheless, in the absence of record evidence, the majority finds that Fullerton and Guzzo exercise independent judgment in effectively recommending discipline. In doing so, they rely entirely on Rellis' testimony, as this is the only relevant evidence the Employer has presented to show that Fullerton and Guzzo effectively recommend discipline. Based on this testimony, the majority hypothesizes that Rellis has a policy of simply "rubber stamping" the disciplinary recommendations he receives from Fullerton and Guzzo without conducting an independent investigation of the incidents that prompted the recommendations, and that he approves these recommendations "100% of the time."[3] On that basis, the majority finds that, when Fullerton or Guzzo recommend discipline to Rellis, discipline ensues without an independent investigation by Rellis. Thus, the majority ultimately concludes that Fullerton and Guzzo have the authority to effectively recommend discipline.

However, the majority's conclusion is contrary to two well-established principles that are relevant to the analysis of supervisory issues. First, as the majority concedes, the burden of proving that an individual is a supervisor is on the party alleging such status. *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001). Any lack of evidence is held against the party asserting supervisory status. See *Elmhurst Extended Care Facilities*, 329 NLRB 535 fn. 8 (1999). Thus, when the party asserting supervisory status has failed to make the required showing, it is inappropriate for the Board to "fill in the blanks." Second, in order to confer supervisory status, "the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel." *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002). Applying these principles to the facts of this case, there is simply insufficient evidence in the record to support the majority's inference that the disciplinary recommendations that Fullerton and Guzzo make lead to personnel action without independent investigation by Rellis.

The record evidence does not support the majority's inference that Rellis *does not* conduct an independent investigation when he receives disciplinary recommendations from Fullerton and Guzzo. Despite the majority's attempt to extract such an inference from Rellis' testimony, that testimony does not--either explicitly or implicitly--establish that Rellis has a policy of refraining from independent investigation when he receives these recommendations. Rellis vaguely testified that disciplinary recommendations get turned into him "to review" and that *if* the recommendations are "routine" or "justifiable," he will sign off on them. However, his testimony

[1] I join the majority in adopting the hearing officer's finding that Fullerton and Guzzo are not, as the Employer argues, statutory supervisors by virtue of their authority to assign work/and or direct the work of employees.

[2] Rellis also testified that Fullerton and Guzzo perform supervisory duties as part of their overall duties even when the stipulated statutory supervisors are on duty.

[3] The majority contends that I have misstated their position by characterizing their perception of Rellis' treatment of the disciplinary recommendations as "rubber stamping." However, given that the majority is arguing that these recommendations are approved by Rellis in all cases without his conducting an independent investigation—and his having, at most, engaged in a perfunctory review—my characterization of this process as "rubber stamping" is entirely accurate.

does not reveal exactly *how* he "reviews" these recommendations before "signing off" on them. In other words, Rellis' testimony does not indicate what specific steps he takes in reviewing the recommendations; the extent to which he reviews them; or what factors he takes into consideration in determining whether or not to follow the recommendations. And, it does not establish how Rellis determines whether the recommendations are "routine" or "justifiable" or what he does if he determines that they are not. What Rellis' testimony does establish, if anything, is that it is reasonable to infer that Rellis conducts some sort of "review" of the recommendations, and that he does not simply "rubber stamp" them, as the majority seems to suggest. It also suggests that this review may be intensified if the recommendations at issue are not "routine" or "justifiable." In any case, the record is silent as to exactly *what* actions Rellis takes between the time he receives these recommendations and the time he reaches a final decision concerning their disposition.

Nevertheless, the majority relies upon the lack of evidence regarding how Rellis handles the disciplinary recommendations prepared by Fullerton and Guzzo to infer by omission that he does nothing--that is, that he does not conduct an independent investigation concerning these recommendations. In doing so, the majority has lost sight of the well-settled principle that it is incumbent upon the Employer, as the party alleging that Fullerton and Guzzo are supervisors, to *affirmatively* show that their disciplinary recommendations essentially pass through Rellis without his conducting an independent investigation. It is not the responsibility of the opposing party to make a contrary showing. See *Kentucky River*, 532 U.S. at 712. Accordingly, given the lack of evidence in the record that Rellis does not conduct an independent investigation in response to the disciplinary recommendations he receives from Fullerton and Guzzo, the majority's unsupported attempt to "fill in the blanks" in order to reach this finding is unavailing.[4] See *Elmhurst Extended Care Facilities*, 329 NLRB at 536 fn. 8 (any lack of evidence is held against the party asserting supervisory status.).

Further, contrary to the majority, the Employer has failed to demonstrate that Fullerton and Guzzo recommend the type of "discipline" needed to confer supervisory status. According to the majority, the fact that Rellis has received three to five disciplinary recommendations from Fullerton--and has approved all of them without conducting an independent investigation--shows that, when Fullerton and Guzzo recommend discipline, "discipline ensues." The recommendations on which the majority relies in support of this proposition were not even introduced into the record. Thus, in finding that these recommendations constitute evidence of Fullerton's and Guzzo's authority to effectively recommend discipline, the majority relies solely on Rellis' testimony that he followed the disciplinary recommendations he received from Fullerton. However, since Rellis testified *only* that he followed the recommendations, Rellis' testimony does not indicate what level of discipline was

[4] In arguing that Rellis does not conduct an independent investigation concerning disciplinary recommendations he receives from Fullerton and Guzzo, the majority postulates that any review Rellis undertakes of these recommendations is limited to simply "considering" them and "adding his own judgment and insight" before reaching a final decision as to their disposition. However, as discussed above, Rellis testified only that the recommendations come to him for review and that he signs off on them if they are "routine" or "justifiable." There is no evidence indicating what actions Rellis takes between the time he receives the recommendations and the time he signs off on them—not even that he "considers" them or "adds his own judgment and insight," as the majority speculates. By the same token, there is no evidence that he does not conduct an independent investigation concerning these recommendations.

The majority further postulates that Rellis approves these disciplinary recommendations without conducting an independent investigation "in all cases that reach him"; the majority contends that this demonstrates that Fullerton's and Guzzo's disciplinary recommendations are effective. However, as noted above, Rellis' testimony establishes only that Rellis approves the recommendations if they are "routine" or "justifiable." Significantly, his testimony—and the record as a whole—is silent as to how he handles recommendations that are *not* "routine" or "justifiable." Hence, the record fails to establish that Rellis has a blanket policy of approving all disciplinary recommendations that reach him without resort to an independent investigation. In fact, if anything, Rellis' testimony implies that it is just as likely that Rellis will not do so when the recommendations are not routine or justifiable. This, of course, undercuts the majority's finding that Fullerton's and Guzzo's disciplinary recommendations automatically lead to discipline in all cases.

The majority also disputes my interpretation of Rellis' testimony as stating that he will sign off on disciplinary recommendations he receives from Fullerton and Guzzo when they are "routine" or "justifiable." The majority, in contrast, interprets this portion of Rellis' testimony as stating that "when he receives these recommendations, and they are 'justifiable,' he will 'routine[ly]' sign off on them." Given that Rellis' testimony in general—and on this issue in particular—is ambiguous, it should be construed against the Employer, the party asserting supervisory status. See the discussion of the burden of proof in the text above. However, even assuming arguendo that the majority's interpretation of Rellis' testimony is the more reasonable one, it still does not advance the majority's theory that Rellis does not conduct an independent investigation into the disciplinary recommendations he receives from Fullerton and Guzzo and that their recommendations are therefore "effective." In this regard, even assuming that Rellis testified that he "routinely" ends up approving all "justifiable" recommendations from Fullerton and Guzzo, as the majority asserts, his testimony is still silent as to what specific actions he takes before he "routinely" approves such recommendations. Further, under the majority's interpretation of Rellis testimony, the question of how Rellis handles disciplinary recommendations that are not "justifiable" is still left unanswered.

recommended or imposed in these instances. Even assuming that Rellis did not--as the majority contends--conduct an independent investigation of any of the recommendations made by Fullerton before he approved them, it is not known whether the recommendations he approved even resulted in the type of personnel action that the Board has deemed sufficient to confer supervisory status. Significantly, the Board has recognized that the authority to issue minor corrective actions, such as verbal and written warnings, is too minor a disciplinary function to confer supervisory status when there is no evidence that the warnings form the basis for further discipline or otherwise affect job status. See *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393-394 (1989); *Passavant Health Center*, 284 NLRB 887, 889 (1987).

Because the level of discipline that was imposed based on Fullerton's recommendations to Rellis is unknown, there is no evidence to support a conclusion that that discipline formed a basis for further discipline or otherwise affected the job status of the employees involved. Even assuming *arguendo* that there was evidence to this effect, the fact that Rellis happened to approve a mere handful of these recommendations is hardly sufficient to establish that Rellis has an established practice of approving such recommendations in all, or even most, instances. Accordingly, these few approved disciplinary recommendations fail to establish that Fullerton and Guzzo have the authority to effectively recommend discipline.[5]

For these reasons, the majority's reliance on *Progressive Transportation*, 340 NLRB No. 126 (2003), is misplaced. In *Progressive*, the Board found that an employee exercised independent judgment in effectively recommending discipline, and was therefore a supervisor, because, when she brought disciplinary issues to the operations manager, the manager did not independently investigate her recommendations to impose discipline, and he normally followed these recommendations. Id. at slip op. at 2-3. As noted by the majority, the Board, in reaching this finding, emphasized, inter alia, that the employee had the power to decide on her own whether to initiate the disciplinary process by taking disciplinary issues to the operations manager, that the manager did not conduct an independent investigation of these issues, and that he typically followed her recommendations regarding the imposition of discipline, as evidenced by 33 approved disciplinary notices that were introduced into the record. Id. at slip op. at 3.

The majority maintains that, because Fullerton and Guzzo play "a similar role" in the disciplinary process to the employee in *Progressive*, they should also be found to be supervisors. However, as discussed above, unlike the disciplinary process in *Progressive*, there is insufficient evidence in this case to support a conclusion that Rellis does not conduct an independent investigation when he receives disciplinary recommendations from Fullerton and Guzzo. Also, there is insufficient evidence to show that Rellis has an established practice of following these recommendations, as was the case in *Progressive*. As noted above, the employer in *Progressive* introduced into the record 33 disciplinary notices, which reflected that the operations manager had followed the employee's recommendations to impose discipline in all of these cases; and, significantly, some of these notices were referenced in later, more serious, personnel actions taken against the same employees. Id. at slip op. at 3-4. By contrast, in the present case, Rellis *testified* that he has received only between *three* and *five* disciplinary recommendations from Fullerton and that he has followed all of them; and, as noted above, there is no evidence that these recommendations led to the type of personnel action that could serve as the basis for further discipline.[6] In these circumstances, it cannot be said that Fullerton's and Guzzo's role in the disciplinary process is akin to that of the employee in *Progressive*.[7]

For all of the above reasons, there is insufficient evidence in the record to support the majority's conclusion that the disciplinary recommendations made by Fullerton and Guzzo lead to personnel action without resort to an independent investigation by Rellis. In fact, the evidence in the record establishes only that Fullerton and Guzzo report disciplinary issues to Rellis and make recommen-

[5] The majority argues that, even if the three to five approved disciplinary recommendations fail to show that Fullerton *exercised* the authority to effectively recommend discipline in these instances, the record otherwise reflects that Fullerton and Guzzo have the *authority* to do so. This argument is, of course, inconsistent with the majority's substantial reliance on these recommendations to support its finding that Fullerton and Guzzo have such authority. In any event, contrary to the majority, I do not suggest that these recommendations fail to show that Fullerton *exercised* the authority to effectively recommend discipline, but, rather, that—for the reasons discussed above—they fail to show that Fullerton and Guzzo have this authority in the first place.

[6] As noted above, these recommendations were not introduced into the record.

[7] The majority contends that the facts of this case provide an even stronger basis for finding supervisory status than in *Progressive*, supra, because, unlike the employee in *Progressive*, Fullerton and Guzzo—when they bring potential disciplinary issues to Rellis' attention—have the authority to recommend a specific level of discipline. However, absent evidence that Rellis does not conduct an independent investigation of these recommendations, the fact that Fullerton and Guzzo possess the authority to make the recommendations is insufficient to show that they effectively recommend discipline and are therefore statutory supervisors. See *Franklin Home Health Agency*, supra, at 830 (holding that, in order to confer supervisory status, "the exercise of disciplinary authority must lead to personnel action, *without the independent investigation or review of other management personnel*.") (emphasis added).

dations for discipline, but that it is Rellis who, after reviewing the recommendations, ultimately decides whether to impose discipline. As the hearing officer found, this type of reportorial authority does not establish supervisory status. See, e.g., *Millard Refrigerated Services, Inc.*, 326 NLRB 1437, 1438 (1998) (holding that employees did not effectively recommend discipline because, when they submitted disciplinary forms to the plant superintendent, the superintendent approved them only after conducting an independent investigation; thus, the employees' act of submitting the forms was nothing more than a reportorial function that was typical of a "leadman" position and did not require the exercise of independent judgment.).[8]

Thus, in view of the foregoing, the Employer has failed to present sufficient evidence to show that Fullerton and Guzzo exercise independent judgment in effectively recommending employee discipline and that they are statutory supervisors. Accordingly, the hearing officer's recommendation to overrule the challenges to their ballots should be adopted.

Dated, Washington, D.C. December 16, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

[8] The members of the majority have also suggested—although on the basis of slightly different rationales—that Fullerton and Guzzo are supervisors based on their regular service as "substitute supervisors". However, the Board has long recognized that, regardless of how frequently an employee substitutes for a supervisor, if he or she does not exercise the supervisor's statutory authority while acting as a substitute, then he or she is not a statutory supervisor. *See, e.g., Passavant Health Center*, 284 NLRB 887, 892 (1987); *The Boston Store*, 221 NLRB 1126, 1127 (1975). In this case, because there is no evidence in the record that Fullerton and Guzzo possess any statutory supervisory authority when they substitute for the regular supervisors, such substitution does not confer supervisory status on Fullerton and Guzzo.

The majority further finds that Fullerton and Guzzo possess some secondary indicia of supervisory authority. However, because the Employer has failed to show that Fullerton and Guzzo possess any primary indicia of supervisory authority, these secondary indicia are by themselves insufficient to establish supervisory status. See, e.g., *SDI Operating Partners, L.P.*, 321 NLRB 111, 112 fn. 2 (1996) ("In the absence of primary indicia as enumerated in Sec[tion] 2(11) . . . secondary indicia are insufficient to establish supervisory status.").

APPENDIX

HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS AND OBJECTIONS

I. STATEMENT OF THE CASE

Pursuant to a Stipulated Election Agreement approved by the Regional Director on December 2, 2003, an election by secret ballot was conducted on December 19, 2003, among employees in the unit heretofore found appropriate.[1] The results of the election are set forth below:

1. Approximate number of eligible voters174
2. Void ballots1
3. Votes cast for Petitioner75
4. Votes cast against participating labor organization70
5. Valid votes counted145
6. Challenged ballots7
7. Valid votes counted plus challenged ballots152
8. Challenges are sufficient in number to affect the results of the election.

On December 26, 2004, the Petitioner filed timely Objections to conduct affecting the results of the election, a copy of which was duly served upon the Employer.

The Objections, as amended, allege as follows:

> 1. The Employer altered its method of paycheck distribution during the 24-hour period immediately preceding the election. Specifically, the Employer included leaflets in the employees' December 19, 2003, paychecks urging the employees to vote in the election so that fellow employees do not decide "your future and the future of your family."
>
> 2. The Employer stationed a supervisor of guards outside the entrance to the polling place, thus creating a chilling and intimidating effect of the free choice of the voters.
>
> 3. The *Excelsior* list provided by the Employer to the Union contained approximately 18 to 20 incorrect addresses, thus hindering the Union's ability to communicate with said employees.

At the election the Petitioner challenged the ballots of seven individuals, Dwayne Edward Franklin, Cheryl Guzzo, Julie Lynne Krynicki, Wanda Board, Evelyn Fullerton, Crystal D. Gajtka and Laura Lynn Smith on the ground that they are supervisors within the meaning of the Act.

As noted, the election was conducted on Friday, December 19, 2003. On Monday, December 22, 2003, at 9:20 a.m., the Regional Office received via facsimile, a letter from the Employer stating, in pertinent part, "Employer Mountaineer Park hereby accepts the Union's challenges to the ballots of *Cheryl*

[1] The unit agreed upon in the Stipulated Election Agreement included all full-time and regular part-time hotel and trackside housekeeping employees, front desk clerks, front desk receptionists/switchboard employees and night audit clerks employed by the Employer at its Chester, West Virginia, facility; excluding office clerical employees, trackside switchboard employees and guards, professional employees and supervisors as defined in the Act, and all other employees.

Guzzo (Housekeeping-Gaming) and *Evelyn Fullerton (Housekeeping-Lodge)*". On that same day, the Region, consistent with long-standing Board policy, sent the parties a letter confirming the names of the individuals challenged in the election and asking the parties to submit within 7 days their positions on the eligibility of the challenged voters.

Thereafter, on December 23, 2003, the Petitioner submitted a letter to the Region withdrawing its challenges to all 7 voters including Guzzo and Fullerton. On December 23, 2003, the Regional Director issued an Order to Show Cause why the withdrawal of the challenges should not be approved and the ballots opened and counted.

On December 29, the Employer responded to the Order to Show Cause and argued that its letter of December 22 constituted a resolution of the challenges as to Guzzo and Fullerton in favor of the Petitioner's challenges. Therefore, according to the Employer, only the other five previously challenged voters remained in question after that date and those were subsequently resolved by the Petitioner's withdrawal of its challenges. In support of its position, the Employer asserts that once the parties have resolved a contested matter, further action by the Regional Office is not required to validate the disposition.

In accordance with Section l02.69 of the Board's Rules and Regulations, Series 8, as amended, an investigation of the objections and challenged ballots was made during which the parties were afforded an opportunity to submit evidence bearing on the issues. On January 23, 2004, the Regional Director issued an Order Directing Hearing on Challenged Ballots and Objections and Notice of Hearing.

Pursuant to the aforementioned Order and Notice of Hearing and pursuant to Section l02.69 of the Board's Rules and Regulations, Series 8, as amended, a hearing was held before the undersigned in Pittsburgh, Pennsylvania, on January 28, 2004. All parties were represented by counsel and were afforded full opportunity to be heard, to call, examine and cross-examine witnesses, to introduce relevant evidence, to argue orally, and to file briefs with the undersigned after the close of the hearing.

Upon the entire record in this case and from my careful observation of the witnesses and their demeanor and an analysis of their testimony, I make the following findings, conclusions and recommendations with respect to the issues involved herein.

II. FINDINGS OF FACT

Background

At the hearing the parties stipulated as to certain background information regarding the Employer and its facility. Specifically, the parties stipulated and I find that the Employer, Mountaineer Racetrack and Gaming Resort, is located in Chester, West Virginia. Its facility includes a racetrack, lodge, hotel, fitness center, casino with video lottery terminals (slot machines), a number of restaurants, an entertainment center and a convention center. The Employer employees approximately 1,700 employees. The Unit sought herein includes employees of the housekeeping department and the front desk, a total of approximately 174 employees. The election was held at the facility on December 19, 2003 from 7:30 to 8:30 a.m. and from 5:30 to 6:30 p.m. The room where the election took place was a hotel room at the end of the first floor corridor in the convention center located approximately 200 feet from the front desk, which is the nearest point in the lobby to the hotel room. A site map submitted by the parties and admitted into evidence as a joint exhibit indicates that an exit from the facility is located at the end of the same hallway just past the voting room (JX-1).

The Challenged Ballots

At the hearing although both parties took the position that four of the seven individuals challenged, Dwayne Edward Franklin, Julie Lynn Krynicki, Crystal Gajtka and Laura Lynn Smith, were not supervisors within the meaning of the Act, the Petitioner was unwilling to enter into a stipulation concerning the aforementioned individuals supervisory status. Neither party asserted at the hearing that Franklin, Krynicki, Gajtka and Smith were supervisors and neither party elicited any testimony or presented any evidence to establish that these individuals were supervisors within the meaning of Section 2(11) of the Act.

It is well established that the burden of establishing supervisory status rests on the party asserting that status. NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001); Benchmark Mechanical Contractors, Inc., 327 NLRB 829 (1999). Here, as noted, no party at the hearing asserted or presented any evidence to establish that Franklin, Krynicki, Gajtka or Smith are supervisors within the meaning of the Act. Accordingly, in these circumstances, I recommend that the challenges to the ballots of Franklin, Krynicki, Gajtka and Smith be overruled in their entirety.

There remains for consideration the supervisory status of Wanda Board,[2] Cheryl Guzzo and Evelyn Fullerton. As noted above, on the day following the election, the Employer submitted a letter to the Region stating that it "accepts the Union's challenges" to the ballots of Guzzo and Fullerton. Almost simultaneously, the Petitioner sent a letter to the Regional Office withdrawing its challenges to all of the ballots. The Employer contends that its letter accepting the challenges resolves the matter and removes from the Board the power to determine the eligibility of these employees. In support of this position the Employer cites several cases for the proposition that once contested matters have been resolved, those matters are no longer before the Region. None of the cases cited[3] involves a situation in which the parties have reversed their positions following an election. Rather, the only case cited which involves the resolution of matters prior to a hearing does not involve the withdrawal of challenged ballots. In *Precision Products*, supra, an objection that had previously been withdrawn by the objecting party and approved by the Regional Director was found not to be properly before the Hearing Officer. In the present case, the Regional Director did not approve the either the Employer's

[2] The parties also initially took the position that Wanda Board, a challenged voter, was not a supervisor within the meaning of the Act. The Petitioner subsequently amended its position to claim that Board shared the same or similar duties as Cheryl Guzzo and that if Guzzo was found to be a supervisor Board should be found to be one as well.

[3] *Precision Products Group, Inc.*, 319 NLRG 640, 641 (1995); *Dyncorp/Dynair Services, Inc.*, 322 NLRB 602 (1996).

offer to resolve the challenge ballots or the Petitioner's attempted withdrawal of those same challenges.[4] Thus is clear that the parties have not resolved their dispute as to the eligibility of Guzzo and Fullerton; rather they have switched positions on the matter. The Employer did not inform the Petitioner of its agreement to accept the Union's challenges to these ballots, nor was a stipulation signed by the parties resolving these matters. Thus, it is necessary to resolve the issue by determining whether Fullerton and Guzzo are statutory supervisors excluded from voting.

Inasmuch as I have found that the Board retains jurisdiction over the eligibility of Guzzo and Fullerton it is necessary to determine the eligibility status of those individuals. The Employer asserts that Guzzo and Fullerton, who are employed in the Employer's housekeeping department, are statutory supervisors within the meaning of the Act and are therefore ineligible to vote in the election. The Director of Housekeeping is David Rellis, who has held this position for four years. Rellis oversees the two sections of the housekeeping department: lodge and gaming. The lodge housekeepers clean the approximately 360 guest rooms located in two buildings, the gaming housekeepers are responsible for the public spaces covering approximately 100,000 square feet of space. Each section has its own stipulated supervisor. Debbie Kuykendal supervises the lodge section and the gaming section is supervised by Billy Jo Jenkins. The parties agreed that both Kuykendal and Jenkins are supervisors within the meaning of the Act. About 25 to 35 housekeepers work each day in the lodge section, while about 20 work in the gaming section. Kuykendal and Jenkins each work five days per week. According to Rellis, when Kuykendal or Jenkins are not scheduled to work, their duties are performed by assistant supervisors Evelyn Fullerton and Cheryl Guzzo, respectively. Rellis stated that Fullerton and Guzzo spend about 50 percent of their workday performing housekeeping work. The amount depends upon whether Kuykendal or Jenkins are working. If they are, then the amount of housekeeping work performed by Fullerton or Guzzo increases. The supervisors and assistant supervisors all wear uniforms, and are paid on an hourly basis. The assistant supervisors are paid $1.25 - $2 less than the supervisors, and 50 cents to $1 more than the senior housekeepers.

With regard to the factors indicating supervisory status listed in Section 2(11) of the Act, the assistant supervisors have no authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward employees, or to adjust their grievances or to effectively recommend such action. The evidence on the remaining factors is set forth infra.

. . . .

[4] See e.g. *Mediplex of Connecticut, Inc.*, 319 NLRB 281, 299 (1995) where the Board retained jurisdiction over the eligibility of a voter whose ballot was initially challenged by the Employer. Following the election, the Employer sought to withdraw its challenge, however the Union contended that the employee did not meet the criteria for eligibility. The Regional Director's refusal to accept the withdrawal was upheld by the Board.

Discipline

Rellis testified that both Fullerton and Guzzo possess the authority to discipline employees in their section. In doing so, each may write a proposed discipline and submit it to Rellis. If Rellis approves the discipline, he will sign off on it. In the past year, Fullerton presented to him between three and five disciplinary write-ups, all of which he reviewed and signed. The Employer did not provide any instances in which Guzzo prepared a disciplinary action. The Employer further did not provide a copy its disciplinary policy or any copies of disciplinary actions prepared by either Fullerton or Guzzo. Neither Fullerton nor Guzzo testified at the hearing.

Analysis

Section 2(11) of the Act defines a "supervisor" as:

> [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The types of supervisory authority are listed in the disjunctive, thus possession of any one authority is sufficient to establish supervisory status upon the individual. The exercise of this "authority must be in conjunction with independent judgment in the employer's interest." *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). The absence of a statutory supervisor on site does not automatically confer 2(11) status on the highest-ranking remaining employee. *Training School at Vineland*, 332 NLRB 1412 (2000).

As noted previously, it is well established that "a party seeking to exclude an individual from voting for a collective-bargaining representative has the burden of establishing that the individual is, in fact, ineligible to vote. *Phelps Community*, 295 NLRB at 490, citing *Ohio Masonic Home*, 295 NLRB 373 (1989); *NLRB v. Kentucky River Community Care, Inc.*, supra. Where the evidence is in conflict, or is inconclusive, the Board "will find that supervisory status has not been established, at least on the basis of those indicia." *Phelps Community*, supra. Any lack of evidence is held against the party asserting supervisory status. "Independent judgment" is defined by the Board as "judgment the use of which requires that it be exercised beyond that involved in regular or customary activities and which is not controlled or significantly constrained by outside sources…." *Vineland*, 332 NLRB at 1413. Moreover, "isolated or sporadic exercise of authority is insufficient to establish supervisory status." *Byers Engineering Corp.*, 324 NLRB 740, 741 (1997) citing *Bowne of Houston*, 280 NLRB 1222, 1223 (1986).

As noted previously, neither Fullerton nor Guzzo are involved in hiring, transferring, suspending, laying off, recalling, promoting, discharging, rewarding, or adjusting grievances. The remaining issues are therefore whether they responsibly assign and direct the workforce and whether they have the au-

thority to discipline the workers in their departments, or to effectively recommend such action. I conclude that they do not.

. . . .

b. Discipline

The record also does not establish that either Fullerton or Guzzo exercise the power to discipline employees or to effectively recommend such action. The only evidence presented regarding this issue was by Rellis who testified that Fullerton and Guzzo may submit written disciplinary forms to Rellis who may or may not determine that the action or inaction of the employee warrants disciplinary action. Rellis' testimony indicates that only he determines whether to issue the disciplinary action. In the past year Fullerton forwarded to Rellis between three and five disciplinary write ups. The record does not indicate that Guzzo recommended any disciplinary action. As Rellis makes the independent determination whether to issue discipline, it would appear that at best Fullerton and Guzzo are not doing anything more than reporting potential disciplinary issues to Rellis, which do not require the use of independent judgment. *Mallard*, supra.

Based on the above and the record as a whole, I find and conclude that Evelyn Fullerton and Cheryl Guzzo are not supervisors within the meaning of the Act, and I recommend that the challenges to their ballots be overruled. Furthermore, inasmuch as the only contention regarding the supervisory status of Wanda Board was that the Petitioner claimed that since their they held similar duties, if Cheryl Guzzo was found to be a supervisor then Wanda Board should also be found to be a supervisor, I recommend that Wanda Board is not a supervisor within the meaning of the Act, and I recommend that the challenge to her ballot be overruled.

The Objections

Objection No. 1

As stated above, the Petitioner alleges that:

> The Employer altered its method of paycheck distribution during the 24-hour period immediately preceding the election. Specifically, the Employer included leaflets in the employees' December 19, 2003, paychecks urging the employees to vote in the election so that fellow employees do not decide "your future and the future of your family."

The evidence is undisputed that on the day of the election, a payday, a flyer was handed to employees along with their paychecks. The top half of the page consisted of two words, "VOTE TODAY." The bottom half of the page gave information to employees regarding the election. Specifically the flyer read:

> This is *very* important. If you don't care, if you don't bother to vote, the employee next to you *will* vote. He or she will decide *your future and the future of your family.*
>
> - The secret ballot vote is in Room 1049 in the New Hotel Wing.
> - The voting is 7:30-8:30 a.m. and 5:30 to 6:30 p.m.
> - If you can't vote off-shift, then tell your supervisor, who will let you vote on-shift. (PX-1)

The Petitioner did not provide any additional evidence regarding this issue, relying upon the flyer as being in itself illegal.

Director of Housekeeping, David W. Rellis, testified that he gave copies of the flyer to departmental supervisors to pass out to employees along with their paychecks. Rellis testified that flyer such as these are given to employees in virtually each pay. When the flyer is department-specific, it is handed out to employees. When the flyer is a corporate flyer, given out to all employees, the flyer is stapled to the envelope containing the employee's paycheck. Joseph Leja, Director of Human Resources, confirmed the testimony of Rellis, stating that his department staples flyers to the paychecks about twice each month but that the flyer handed out the day of the election, being a departmental flyer, was not stapled to the paycheck.

The Board adopted, in *Kalin Construction Company, Inc.*, 321 NLRB 649 (1996) "a strict rule against changes in the paycheck process, for the purpose of influencing the employees' vote in the election, during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls." *Kalin*, 321 NLRB at 650. This rule prohibits change to four elements of the payroll process:

1. The paycheck itself.
2. The time of paycheck distribution.
3. The location of paycheck distribution.
4. The method of paycheck distribution.

Kalin, 321 NLRB at 652. A change of any of the four above-described elements would cause an election to be set aside. However, the Board clearly limited the extent of this rule so that it would have no effect on "the circulation of campaign literature at any time prior to an election." The burden is on the Union to show that a change in the paycheck process occurred. *Kalin*, citing *Bufkor-Pelzner Division*, 169 NLRB 998, 999 (1968).

In the present case the Petitioner does not allege any change to the paycheck given to employees, the time the paycheck was distributed to them, or the location of paycheck distribution. Thus the remaining issue is whether giving the flyer to employees along with their paycheck altered the method of paycheck distribution. This question is answered in the negative. The sole witnesses to testify to the method by which paychecks are distributed by the Employer, testified that management regularly hands out flyers to employees along with their paychecks. This occurs virtually every week. Thus the Petitioner has failed to establish that a change was made in the process of providing paychecks. Further, a reading of the plain language of the flyer at issue makes clear that the flyer, which merely urges that employees vote, was not even campaign propaganda. Moreover, it is well established that although an employer may not hold captive audience speeches directed to employees twenty-four hours prior to an election, that this prohibition does not prohibit the circulation of campaign literature or any other legitimate campaign propaganda or media. *Peerless Plywood*, 107 NLRB 427, 430 (1953). See also *Virginia Concrete Corporation, Inc.*, 338 NLRB No. 183 (2003). Accordingly, I recommend that Petitioner's Objection No. 1 be overruled in its entirety.

Objection No. 2

As stated above, the Petitioner alleges that:

> The Employer stationed a supervisor of guards outside the entrance to the polling place, thus creating a chilling and intimidating effect of the free choice of the voters.

Most of the facts on this issue are not in dispute. The polling area was located at the end of a main corridor in the last hotel room. Past the room entrance is an exit door to an outside parking lot. Following the pre-election conference two union organizers, Director of Organizing Lance Huber and Organizer Matt Lewis, exited the building through that exit door. Robert Parrish, a security supervisor escorted Huber and Lewis toward their car. Huber and Lewis both testified that about mid way through the first session of the election[5] they returned to the parking lot in their car in order to drop off employee Jeff Hutchison to vote. Hutchison did not testify at the hearing. Huber and Lewis testified that they observed Parrish standing outside the exit door, approximately five to ten yards from the door. Parrish was not alleged to be standing in front of the exit door. When Huber and Lewis returned to the parking lot for at the end of the first session, Parrish was standing in the same area. In the late afternoon, Huber and Lewis returned for the second session, Parrish met them at the exit door and followed them inside the building for the second pre-election conference. After informing the Board Agent of the supervisor's presence, the Board Agent suggested to the Employer's attorney that Parrish not be outside the polls. Huber and Lewis testified that they did not see Parrish following the second pre-election conference.

Parrish testified that he is a security supervisor. Operations Manager Bill Tice assigned Parrish to escort non-employee union organizers following the pre-election conference to make sure that the organizers did not remain on the grounds of the facility during the election period. At the end of the polling period, Parrish was directed to return to the polling area. Parrish testified that after he confirmed that the organizers left the parking lot, he performed his regular functions, patrolling the outer perimeter of the buildings in the parking lot. He denied being near the voting area during the first polling period.

Huber and Lewis testified, and Parrish confirmed, that Parrish was present outside the exit door near the polling area when the union agents arrived for the morning pre-election conference, and following the morning pre-election conference. Parrish was also present when the Union agents arrived following the close of the first session and when they returned for the afternoon pre-election conference. Clearly Parrish, like Huber and Lewis as union agents, were permitted outside the polling area at those times. What is in dispute is whether Parrish was present on one occasion when Huber and Lewis returned to the parking lot with an employee coming to vote, and whether his presence near the exit door at that time was objectionable. Further, the Petitioner contends that Parrish's presence at those times indicates that Parrish was near the exit door throughout the morning voting session.

The Board has found that "the continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct…" which led to a finding that such conduct "interfered with the employees' freedom of choice in the election." *Performance Measurements Co., Inc.*, 148 NLRB 1657, 1659 (1964). However, the mere presence of a supervisor near the polls without more does not constitute election interference. *Standard Products Inc.*, 281 NLRB 141, 164 (1986). Cases such as *Performance* and more recently *ITT Automotive, a Division of ITT Corp.*, 324 NLRB 609 (1997), hold that an employer engages in objectionable conduct whenever there is more than a short term presence of a supervisor near the polling area where employees were required to pass. In *Performance*, the company president sat a table six feet away from the entrance to the polling place and even entered the polling place on two occasions during the election period. In *ITT Automotive*, all employees were required to pass by a "massed throng of supervisors" which was in place during the entire 3-hour polling period.

In the present case, assuming the Petitioner witnesses are credited, with the exception of the beginning and ending of the polling periods when the Petitioner's agents were leaving or returning to the facility, supervisor Parrish was seen on only one occasion by one employee during the polling period in a location near the polling place. There is no evidence that multiple employees passed by Parrish on their way to the polling place from the parking lot. Further, the evidence does not indicate that Parrish was able to observe employees inside the building while he was standing outside the building or that Parrish remained outside the hotel's exit door for an extensive period of time. Thus I cannot find that the Petitioner established that there was a "continued presence" by Parrish near the polling area or that "employees" were required to pass by him in order to vote. Further, there was no evidence that Parrish spoke to any employees, engaged in any electioneering with them, or in any way interfered with the conduct of the election. *Standard Products, supra*, 281 NLRB at 164. Accordingly, I recommend that Petitioner's Objection No. 2 be overruled in its entirety.

Objection No. 3

As stated above, the Petitioner alleges that:

> The *Excelsior* list provided by the Employer to the Union contained approximately 18 to 20 incorrect addresses, thus hindering the Union's ability to communicate with said employees.

The relevant facts are not in dispute. The Employer provided an *Excelsior* list containing the names and addresses of 174 voters.[6] During the period leading up to the election, agents of the Petitioner attempted to meet with employees by visiting them at the addresses provided to them. The parties stipulated that when Union organizers visited these addresses

[5] The election consisted of two sessions, the first lasting from 7:30 a.m. to 8:30 a.m. and the second from 5:30 to 6:30 p.m.

[6] The list originally also contained 13 additional names and addresses of employees who the parties, prior to the polling period, agreed were ineligible to vote in the election.

they discovered that 24 of the individual employees did not live at their listed addresses. [7] Thus, the Employer provided incorrect addresses for 13.79% of the potential voters. The Petitioner does not contend that any names or addresses of potential voters were omitted from the list. Upon discovering the inaccuracies, the Petitioner did not inform the Board or the Employer of the errors prior to the election. The Employer maintains that it obtained the addresses from its personnel files, which are updated by employees by way of status change reports. Employees are informed by management at orientation that they are required to provide address changes to management within 7 days of the change. The Petitioner does not contend, and the evidence does not reveal that the Employer was aware of the mistake at the time they prepared the Excelsior list or that it intentionally or negligently misrepresented the addresses.

The eligibility list requirement set forth in *Excelsior Underwear*, 156 NLRB 1236 (1966) has two purposes: "(1) to insure an informed electorate by affording all parties an equal opportunity to communicate with eligible voters, and (2) to expedite the resolution of questions of representation by minimizing challenges based solely on lack of knowledge as to the voter's identity." *Women in Crises Counseling & Assistance*, 312 NLRB 589 (1993). The Board does not apply the *Excelsior* rule mechanically. *Women in Crises*, 312 NLRB at 589 citing *Program Aids Co.*, 163 NLRB 145, 146 (1967). Among the considerations for determining whether an Employer has substantially complied with the *Excelsior* rule are the percentage of incorrect addresses and whether the Employer acted in a "grossly negligent manner." *Merchants Transfer Company*, 330 NLRB 1165 (2000). The Board has found gross negligence when the Employer was aware that many of the addresses were incorrect when it furnished the list to the Employer, *Merchants Transfer*, supra, or when it was made aware of the mistakes and did little or nothing to correct them in a timely manner, *Laidlaw Medical Transportation*, 326 NLRB 925 (1998).

In the present case, there is no allegation or evidence that the Employer was aware that many of the addresses on the list were inaccurate at the time that it furnished the list to the Petitioner. Further, the evidence revealed that the Petitioner failed to notify the Employer of these mistakes, thus giving the Employer no opportunity to correct its error. Thus it cannot be found that the Employer acted in bad faith or with gross negligence. *Women in Crises*, supra.

Further it would not appear that the number of incorrect addresses is enough to show that the Employer failed to comply with its *Excelsior* obligations. As discussed supra, approximately 13.79% of the addresses were incorrect. The Board has regularly found that, in the absence of gross negligence, similar or greater percentages of inaccurate addresses were not considered to be extensive enough to require setting aside the election. See e.g. *Women in Crises*, supra (30% mistake rate); *West Coast Meat Packing Co.*, 195 NLRB 37 (1972) (22% inaccuracy and 4% omission); *Lobster House*, 186 NLRB 148 (1970) (16%). The Board is much more apt to overturn an election when employee names are left off of a voter list, than if addresses are incorrect, since the "potential harm from omissions is sufficiently great to warrant an approach that encourages a conscientious effort by employers to comply with the *Excelsior* requirements." *Woodman's Food Markets*, 332 NLRB 503 (2000). Thus, far lower omission rates have led to the re-run of elections. See e.g. *Woodman's*, supra, (6.8%); *Thrifty Auto Parts, Inc.*, 295 NLRB 1118 (1989); *Gamble Robinson Co.*, 180 NLRB 532 (1970) (10%).

Inasmuch as the number of address inaccuracies was not substantial enough to warrant setting aside the election, and the inaccuracies were not the result of gross negligence or bad faith, I recommend that Petitioner's Objection No. 3 be overruled in its entirety.

III. CONCLUSIONS AND RECOMMENDATIONS

Based on the above, and considering all of the evidence and the credibility of the witnesses, I recommend that the challenges to the ballots of Evelyn Fullerton, Cheryl Guzzo, Wanda Board, Dwayne Edward Franklin, Julie Lynne Krynicki, Crystal D. Gajtka and Laura Lynn Smith be overruled, that their ballots be opened and counted and that a revised tally of ballots and the appropriate certification be issued. Further, on the on the basis of the above, and having considered all of the evidence and the credibility of the witnesses, I recommend that the Petitioner's Objections Nos. 1,2 and 3 be overruled in their entirety.

Under the provisions of Sec. 102.69 of the Board's Rules and Regulations and in accordance with the Regional Director's Order Directing Hearing on Challenged Ballots and Objections and Notice of Hearing, any party may file with the Board in Washington, DC an original and seven (7) copies of exceptions to this Report. Exceptions must be received by the Board in Washington, DC by the close of business at 5:00 p.m. EST (EDT), on March 25, 2004. Immediately upon the filing of such exceptions, the party filing the same shall promptly serve a copy upon the other parties and should file a copy with the Regional Director for Region Six in Pittsburgh, Pennsylvania. If no exceptions are filed to this Report, the Board may adopt the recommendations of the Hearing Officer.

Dated at Pittsburgh, Pennsylvania, this 11th day of March 2004.

[7] The Objection alleges that 18-20 of the addresses were inaccurate. While the Petitioner does not account for this discrepancy, the Employer stipulated, along with the Petitioner, that the correct number of incorrect addresses was 24.